Complaints considered under the Competition Act 1998

1 March 2000 to 31 March 2002

April 2002

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1. Purpose

The Competition Act 1998 (the Act) came into force on 1 March 2000. It gave the Director General of Water Services (the Director) concurrent powers with the Director General of Fair Trading to apply and enforce the Act for the water and sewerage industries. Under the Act, the Director has powers to investigate anti-competitive behaviour.

This report gives an account of the actions we have taken, and are taking, using our powers under the Act. It informs companies, individuals and customer representation organisations wishing to make complaints (complainants) and companies against which complaints are made (complainees) of the types of behaviour that have raised concerns under the Act. The report is the first in an annual series.

This report examines the progress we have made between 1 March 2000 and 31 March 2002 in applying our powers under the Act. **Section 2** provides statistics on the numbers of complaints handled under the Act. **Section 3** describes the outcomes of cases closed in 2000-02 and includes case study examples. **Section 4** describes the approach we have taken in developing new policies, the content of the new policies, and the procedures we developed to implement the Act.

2. Complaints received and issues they raised

2.1 Number of complaints

We received 69 complaints and closed 48 complaints under the Act by 31 March 2002. In the period between 1 April 2001 and 31 March 2002 we received 21 new complaints and closed 16 complaints. Figure 1 shows the number of case files opened and closed each month between 1 March 2000 and 31 March 2002.

Figure 1: Number of complaints opened and closed between 1 March 2000 and 31 March 2002

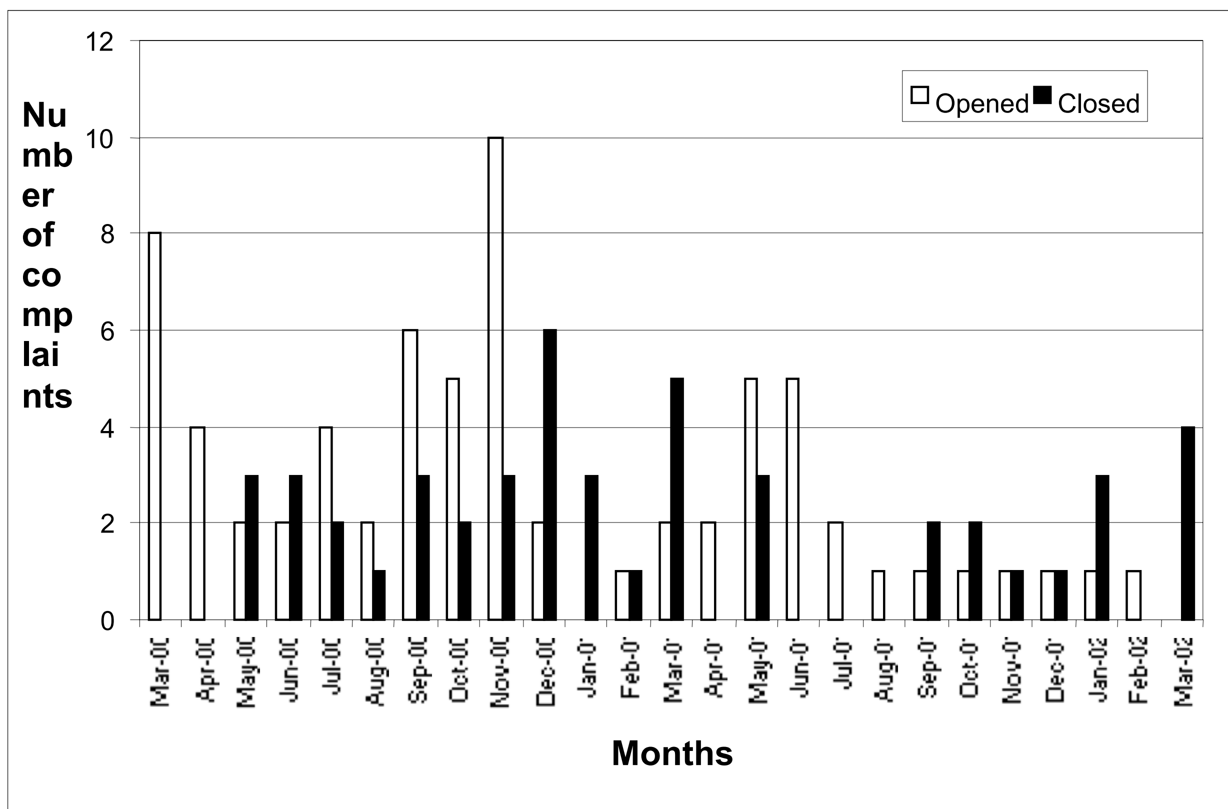

Figure for March 2000 includes five complaints received before the Act come into force.

2.2 Issues raised in complaints

When we receive a complaint we decide whether we can investigate it under the Act or the Water Industry Act 1991 (WIA91). The publication 'The Competition Act 1998 - The Application in the Water and Sewerage Sectors' (OFT422) explains the relationship between the Act and the WIA91 more fully.

Complaints investigated under the Act to 31 March 2002 can be grouped under the following broad headings.

- **Infrastructure** – unreasonable charges, terms and conditions for installing or diverting water and sewerage pipework, including self-lay.
- **Tankered waste** – excessive charges for transport, reception, treatment and disposal of tankered waste (especially from cesspits and septic tanks).
- **Common carriage/network access** – unreasonable charges, terms and conditions set for access to water companies' networks.
- **Special agreements** – predatory pricing by water companies through special agreements for large customers.
- **Marketing and promotion –** water companies promoting other products and services with their water and sewerage services.
- **Charges for abstraction –** excessive charges for water from private water sources.
- **Other –** complaints about outsourcing and contestable work.

Table 1 gives the number of complaints under each heading.

Table 1: Subject matter of complaints considered between 1 March 2000 – 31 March 2002

	Closed 1/3/00 - 31/3/01[1]	Closed 1/4/01 - 31/3/02	Open as of 31/3/02	Total received
Infrastructure	13	6	5	24
Tankered waste	6	1	8	15
Common carriage/network access	4	4	4	12
Special agreements	3	2	2	7
Marketing and promotion	2	2	0	4
Charges for abstraction	0	0	2	2
Other	4	1	0	5
TOTAL	**32**	**16**	**21**	**69**

1) Covers a 13 month period from when the Act came into force on 1 March 2000 to 31 March 2001.

The most common areas of complaints over the past year have been about infrastructure works (11 cases), tankered waste (9 cases) and common carriage (8 cases). These figures include closed and open complaints.

3. Outcome of closed complaints

Table 2 outlines the reasons why we closed cases.

Table 2: Reasons for complaint closure 1 March 2000 – 31 March 2002

Reason	Closed 1/3/00 - 31/3/01	Closed 1/4/01 - 31/3/02	Total closed
No grounds for investigation	13	9	22
Company agreed to change its behaviour	10	6	16
Complaint outside the Act	4	1	5
Negotiation between parties resolved the issue	4	0	4
Complainant successfully pursued an alternative solution to its complaint	1	0	1
TOTAL	**32**	**16**	**48**

We closed 22 complaints because there was not enough evidence of a possible infringement of the Act to justify further work. In most cases, complainants are given the opportunity to comment on our views and submit further information before we close the file. In most cases we did not investigate under the Act because it was difficult to see how there could be an infringement of the prohibitions in the Act. In one case, the complainant had approached us without first giving the complainee reasonable time or information to consider the matter.

To date, we have resolved many complaints by encouraging changes to the behaviour of the companies concerned. Our intervention has often assisted the complainee and the complainant to reach a satisfactory solution between themselves. In cases where the complaints were about self-laid infrastructure, our emerging policy has provided companies and developers with guidance on best practice. This is discussed in more detail in section 4.1. Twenty complaints resulted in positive outcomes for the complainant. In 16 of these, the company agreed to amend its behaviour, and in 4 others the parties negotiated a successful outcome following our intervention. To date we have not issued any decisions. However, in each case we consider all of the options available under the Act.

Below are case studies based on complaints we have received. They set out the concerns raised, how we considered them and the outcomes. We have protected the identity of individuals and companies in this report.

Complaint 1: Water company treating two products differently where both were to be connected to its network

We received a complaint from the manufacturer of equipment A. The complainant alleged that:

- the water company would not allow equipment A to be connected to its water network;
- similar equipment B, which did not meet the level of product verification that the water company required from equipment A, could be connected to the network; and

- the water company marketed equipment B and promoted the equipment's use in its literature.

Before equipment A and B are connected to the water network, they require certification by the Water Regulations Advisory Scheme (WRAS) that they are safe for use. We wrote informally to the water company asking for its reaction to the complaint, and about the nature of any commercial links with the producers of equipment B. The water company said equipment A could be connected to its network once WRAS had certified it, and various other tests and documentation were provided. We spoke to WRAS and found equipment A had not received full certification and this would take some months to complete. In light of this new information, it was difficult to see how the water company could be said to be acting unreasonably in not permitting equipment A to be connected to the water network. But we were still concerned about its alleged behaviour in promoting equipment B.

We sent the water company a formal notice requesting information (a section 26 notice). Later, equipment A received approval from the WRAS technical committee. Over the next few months the water company allowed equipment A to be linked to the water network, and it also co-operated with the complainant to ensure adequate training for fitters of equipment A. References to equipment B were removed from the water company's literature.

We were satisfied that the issues raised in the complaint had been adequately resolved. The complainant agreed and the file was closed. Fourteen months elapsed between receiving the complaint and closing the file.

Complaint 2: Excessive charges for diverting sewers

A building company complained to us about a water company's estimated charge for diverting two sewers. The building company obtained an independent estimate for the work from a pipeline contractor, which was a quarter of the water company's estimate. The water company does not carry out the work itself but either appoints a contractor from its approved list, or puts the work out to tender to its approved contractors. The water company estimated that preparation for the diversion would take either 19 or 24 weeks; the longer period would be required if the work was put out to tender.

We wrote to the water company and asked if the building company could put its preferred contractor on the tender list; why the preparation took so long; and why the building company had not been given a breakdown of estimated costs.

The water company explained that its approved contractors were chosen on technical, financial, health and safety, and value for money criteria. The building company's contractor would have to be assessed on the same basis before it could be placed on the tender list. This might add several weeks to the process. Time was required to complete surveys, design the scheme, serve the statutory notices and plan the site works. The initial cost estimate provided by the water company was based on pessimistic assumptions (to ensure the developer made adequate financial provisions) and a more detailed estimate would be provided once it had received a deposit. Nonetheless the company provided us with a cost breakdown and agreed to pass it on to the building company. Any difference between the estimate and the final out-turn would be settled with the building company.

Because the water company allowed the building company to nominate a contractor to be included on its approved list and the work was awarded on competitive tender, we thought it was difficult to see how the final price was likely to prove excessive. The complaint was closed eight months after receipt.

Complaint 3: Procedures for self-laying water mains

Self-lay and multi-utility organisations lay mains and cables for utilities on behalf of property developers. Developers can opt to requisition the water company to lay water and sewerage mains instead. A self-lay contractor complained to us that a water company refused to allow it to:

- lay water main diversions on its client's land when it had the required accreditation and road opening licences;
- lay off-site water main extensions; and
- connect one main it had laid to another it had laid on the same site.

We wrote to the water company asking it to respond to these issues. It replied saying developers could lay some diversions but it reserved the right to construct mains where a large number of customers would be affected if anything went wrong. On connections, it did not feel that appropriate control mechanisms were in place to protect customers from receiving unwholesome water when third parties did the work. The company was performing trials with a multi-lay contractor to develop these controls.

The complainant took part in the water company's trials and felt the water company had improved its procedures to its satisfaction. We closed the file nine months after receiving the complaint.

While considering this complaint we wrote to all water companies asking them about their self-lay policies and the work they allowed self-lay organisations to do, with a view to developing guidance on best practice. See section 4.1 for further information on this area of work.

Complaint 4: Price of common carriage access to network

Entrant A was seeking to supply some large customers from two new water sources. Entrant A needed access to company B's network to reach its target customers. It requested an indicative price from B. Three months later A complained to us about the delay in receiving a price. We intervened and the next month B provided an indicative price.

Entrant A complained to us again. Its main allegations were that B's access price was excessive and its methodology was not transparent. It suggested that on its interpretation of B's accounts the access price should be lower.

We asked B why its access price did not distinguish between large users and smaller users, as its standard tariff does. (A lower tariff for large users is justified because large users do not use the local pipe network). B recalculated its access price to provide a discount to its access price for large users, based on the ratio of the large user tariff to the standard tariff. We suggested that the access price should logically reflect the difference between large user and standard tariffs, rather than their ratio.

B re-assessed its methodology and offered a revised access price which reflected the difference between large user and standard tariffs. For large users this price was much closer to A's original estimate. We closed the file 14 months after receiving the complaint.

Complaint 5: Access to raw water network

Entrant A sought access to company B's raw water network. Entrant A complained to Ofwat that:

- B would not give it an indicative access price for this part of its network; and
- B would not give it the relevant plans for the network.

We asked both companies for further information relating to the complaint. B argued there was no "off the shelf" price for access to the raw water network. Nonetheless B provided an indicative access price based on the regional costs of raw water treatment, transport and storage. B said it would need to undertake substantial modelling to calculate a firm price. B provided an outline plan of the network, but noted there was no spare capacity and only limited facilities to add water to the system.

As the information had been provided, we closed the file. We reminded company B that companies should provide indicative access prices without delay. Even non-standard prices should be readily available. We closed the file 14 months after receiving the complaint.

4. Developing policy and procedures

4.1 Policy

We develop policy and issue guidance to help parties reduce the risk of infringing the Act. Policy is developed in an open and transparent manner. We believe this approach has helped resolve a number of complaints and will reduce the number of future complaints, especially in those areas where competition was poorly developed before the introduction of the Act.

Generally, our proactive approach involves the following steps.

- Review complaints under the Act to identify frequently arising concerns.
- Write to companies asking about their current practices.
- Develop provisional views of "best practice" and questions on the policy and practices.
- Issue draft guidance for consultation.
- Hold workshops for stakeholders to explain the draft guidance and to hear their views.
- Publish the guidance.
- Once the guidance is published, we expect companies to:
  - review and, as necessary, revise their policies;
  - send these revised policies to us; and
  - adopt and communicate the new policies.

To date we have published guidance on:

- **self-lay –** the laying of new water mains and service pipes by developers; and

- **access codes –** shared use of the network so that an entrant can use a water company's facilities.

Where appropriate, we will continue to develop guidance to address other issues that are attracting significant numbers of complaints under the Act. We are, for instance, considering policy on charging for the treatment and disposal of tankered waste.

Companies should be aware that they must comply with the Act at all times and that we will not hesitate to make decisions under the Act where appropriate. In particular, companies should take care to avoid any potential breaches of the Act where our guidance documents have clarified any areas of uncertainty.

Self-lay

We received complaints and enquiries from property developers and other organisations about water companies' charges for installing new pipes and connecting self-laid pipes to the network, and about delays in providing information about company policies and requirements. The draft guidance asked for stakeholders' views about developers and their contractors installing new water mains and service pipes (self-lay,) rather than using the water company to do this.

'Competition in providing new water mains and service pipes' was published in March 2002. This guidance contains a set of principles that we believe should underlie companies' self-lay policies and procedures. It says which aspects of work we consider to be contestable (open to competition) and non-contestable (for which water companies retain responsibility at the moment).

We are establishing an industry advisory group to encourage companies and self-lay organisations to work together. The group's priorities will be to consider how best to establish national levels of service and a national scheme for approving self-lay organisations. The group will have a key role in facilitating progress in opening up the market for installing new water pipes.

Access codes

Common carriage is where more than one company uses the network to supply their customers. This can increase customer choice by enabling entrants to compete in local markets without duplicating assets unnecessarily. It is an important means of allowing competition to develop in the water industry.

Common carriage access codes describe how owners of the network will provide access to their networks. They have an important role in the development of competition. They should:

- contain enough information to enable prospective applicants to assess the viability of their common carriage proposals;
- explain the application process; and
- provide a framework for negotiation between the parties.

'Access codes for common carriage' was published in March 2002. The guidance encourages best practice across the industry. It sets out the standards of behaviour

expected from an undertaker and an applicant when making and implementing a common carriage agreement.

4.2 Procedures

We want to continually improve our procedures for handling complaints under the Act. As a result of our experience to date, we have modified our procedures to improve case handling and communications, especially between the complainant and us.

It is often easier to investigate complaints if the identity of the complainant, and some of their correspondence, is revealed to the complainee. But Section 55 of the Act contains a general rule that no information that has been obtained under the Act should be disclosed without the consent of the person who gave the information and the person to whom the information relates. An important exception to this is where disclosure is made for the purpose of facilitating the performance of any relevant functions of the Director (these include functions under Part 1 of the Act and the Water Industry Act 1991). We have introduced standard paragraphs in our acknowledgement letter asking complainants to clearly mark as confidential information that they do not wish to be disclosed.

Under the Act, the Director has various powers for gathering information. For example, section 26 of the Act permits the Director to demand documents and information be sent to us at a specified time and location and in a specified format. But in some cases we do not use our formal information gathering powers, at least at the outset, where a complaint may be quickly resolved by more informal routes.

We inform complainants regularly of progress and our proposed next steps in dealing with their complaints. Where appropriate, we telephone the complainant to discuss progress.

Glossary of Terms and Definitions

Cesspits and septic tanks: tanks that collect and store wastewater. From time to time the wastewater is collected by a tanker and taken to a wastewater treatment works. Septic tanks partially treat the wastewater and are emptied less often.

Common carriage: arrangement which provides competitors with access to a water company's network to avoid duplicating assets unnecessarily.

Concurrency: Under the Act the sector regulators have, with two exceptions, all the powers of the Director General of Fair Trading to apply and enforce its provisions with respect to the sectors they regulate. The exceptions are that only the Director General of Fair Trading may issue guidance on penalties and make and amend the Director General of Fair Trading's Procedural Rules.

(non)-Contestable: (not) open to competition.

Large user tariffs: tariffs lower than standard tariffs offered to large industrial and commercial users of water or sewerage services. They reflect the lower costs imposed by these customers.

Multi-lay contractor: This is where one self-lay organisation installs all utility services to a site. This could include gas, electricity, water and telecommunications sometimes in the same trench.

Section 26 notice: section 26 of the Competition Act 1998 gives Ofwat the power to request that undertakings provide specified documents and information if it has reasonable grounds for suspecting that Chapter I or Chapter II Prohibitions of the Act have been infringed.

Self-lay: where developers or their contractors install new water mains and service pipes instead of asking the water companies to do the work.

Tankered waste: wastewater that is conveyed by tankers rather than the sewerage system often because premises are not connected to the sewerage network. Ofwat does not regulate charges for transport or treatment of tankered waste under the Water Industry Act 1991.

Undertaker: a water and/or sewerage service provider licensed under the Water Industry Act 1991. Undertakers do not have an exclusive right to supply water or sewerage services in an area.